



City of San Diego

MARK KERSEY

CITY COUNCILMAN, FIFTH DISTRICT

MEMORANDUM

DATE: July 26, 2013

TO: Todd Gloria, Council President

FROM: Councilman Mark Kersey

RE: Revision to City Municipal Code Chapter 2, Article 7, Section 27.2726

The City's Municipal Code provisions on the procedure for conducting recall elections are contradictory, not in conformance with state law, and likely unconstitutional. The City Council must not allow San Diego voters to be disenfranchised, and we must take steps protect the City and its taxpayers against lawsuits we recognize we are likely to lose. For this reason, I am calling on my colleagues to bring the City's recall election rules in line with state law to ensure that voters may have confidence in the legal viability of future elections.

Many of the Municipal Code sections related to recall elections were put in place in 1968 and 1989, and have not been updated to reflect modern realities or at least one relevant federal court decision. In 2003, U.S. District Court Judge Ted Moskowitz ruled in *Partnoy v. Shelley* that the California State Election Code Section 11382 was unconstitutional. The section states that, "No vote cast in the recall election shall be counted for any candidate unless the voter also voted for or against the recall of the officer sought to be recalled." Judge Moskowitz ruled in favor of the group of voters who sought to strike down the provision, calling it "a severe restriction on their Constitutional right to vote." Since this section of state elections code was eliminated, citizens of the State of California have been free to vote for any candidate in a state recall election, regardless of whether they voted for or against the recall.

City of San Diego rules do not afford voters the same rights in city recall elections. Chapter 2, Article 7, Section 27.2726 of the San Diego Municipal Code states, "No vote cast for a candidate shall be counted unless the voter also voted on the recall question." This language is nearly identical to the state election code language struck down in the U.S. District Court. In addition,

prominent election attorneys have opined publicly that this section of the City's election code is unconstitutional.

Given the events of the past few weeks and the strong possibility of a recall petition's being circulated, we have an obligation to reconcile our Municipal Code with state law. If we fail to do so, the City could be forced to defend a lawsuit – and to cover legal fees in the likely event that the plaintiff prevails.

I request that the Council President docket this matter for the consideration of the Council at the next available Council Meeting. We must act to resolve this issue quickly, as the events of the past few weeks indicate a recall effort is imminent.

Additionally, the City Clerk and City Attorney are already reviewing and recommending updates to the City Charter and Municipal Code and I would request that this memo and a more thorough review of all of the provisions pertaining to the conduct of recall elections be incorporated in their review.

cc: Jan Goldsmith, City Attorney

cc: Elizabeth Maland, City Clerk